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No. 93-1885

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

SESSIONS TANK LINERS, INC.,

Petitioner,

vs.

JOOR MANUFACTURING, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT JOOR MANUFACTURING, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEROME I. BRAUN
(Counsel of Record)
DOUGLAS R. YOUNG
TAMAR PACHTER
FARELLA, BRAUN & MARTEL
235 Montgomery Street, Suite 3000
San Francisco, CA 94104
(415) 954-4400

DAVID E. LUNDIN
402 West Broadway, Fourth Floor
San Diego, CA 92101
(619) 239-0100

Counsel for Respondent Joor Manufacturing, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether a private party can be held liable under federal antitrust laws for anticompetitive restraints resulting from valid governmental action. *See Sessions Tank Liners v. Joor Manufacturing*, 17 F.3d 295, 298 (9th Cir. 1994).

RULE 29.1 STATEMENT

Respondent Joor Manufacturing, Inc. has no parent corporation; it owns less than a fifty percent interest in Tanx, Inc. (N.H.).

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The respondent Joor Manufacturing, Inc. ("Joor") respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 17 F.3d 295 (9th Cir. 1994).

RESPONSE TO STATEMENT OF THE CASE

There is no dispute about the dispositive fact in this case: the only damage petitioner Sessions Tank Liners, Inc. ("Sessions") suffered flowed directly from government regulation, rather than any private anticompetitive conduct. The Court of Appeals found that:

> Sessions has never proved that it sustained injuries from anything other than the actions of municipal authorities. *Sessions*, 786 F. Supp. at 1532. . . . . The injuries for which Sessions seeks recovery flowed directly from government action.

Sessions, 17 F.3d at 299. Even the Petition's convoluted statement of the question presented explicitly concedes that the injury for which Sessions seeks redress resulted not from a private restraint, but from "governmental denials of permits to the excluded rival." Pet. at i.

Sessions' assertion that the Court of Appeals "ignored" the District Court's legal conclusion that Sessions "established 'independent marketplace harm' " is incorrect: the Court of Appeals directly addressed that legal conclusion and found that there was no proof of such harm. The District Court found no injury flowing

from anything other than denial of government permits.[1] 17 F.3d at 299. The Court of Appeals reversed the District Court's legal conclusion that Joor could be held liable under the antitrust laws for influencing such government permit denials. *Id.* at 300. This Court decides the case as it was framed by the Court of Appeals. *See Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 498 & n.2 (1988).

Although Joor challenged the factual findings of the District Court on appeal, the Court of Appeals found it unnecessary to reach those issues "[b]ecause the only anticompetitive injuries that Sessions complains of are the direct result of governmental action . . . . " *Sessions*, 17 F.3d at 301 & n.4. It was not necessary to address Joor's contentions that the District Court lacked evidence to sustain its findings that Joor used improper means in the course of its lobbying efforts, because the Court of Appeals concluded that even if Joor had done so, the District Court erred as a matter of law. *Id.* Because those factual findings are not relevant to this Court's review of the decision below, Joor does not challenge them here. Joor notes, however, that Sessions distorts the Court of Appeals opinion to the extent it implies that the Court of Appeals agreed with, approved or adopted the District Court's factual findings.

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[1] Moreover, Sessions can point to nothing in the record that contradicts the Court of Appeals. The District Court found no evidence that Sessions' injuries flowed from anything other than governmental denial of permits. *Sessions Tank Liners v. Joor Manufacturing*, 786 F. Supp. 1518, 1532 (C.D. Cal. 1991).

REASONS TO DENY THE WRIT

There is no reason to grant the writ. The decision below is in harmony with this Court's decision in *Allied*, 486 U.S. 492, as well as its more recent decision in *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991);[2] it is consistent with every decision of every court of appeals to have considered the question since this Court issued its opinion in *Allied*; and it presents no new issue for this Court's review. Sessions' attempt to manufacture a basis for the discretionary exercise of this Court's jurisdiction relies on (1) distorting and ignoring this Court's precedents, (2) inventing a conflict among the circuits that does not exist, and (3) mischaracterizing a settled issue of law as one which has yet to be decided by this Court. This obfuscation, however, should not distract this Court from the undisputed and dispositive fact that the only injury Sessions suffered flowed directly from government action, rather than private anticompetitive action. The Court of Appeals' application of settled law to this fact is correct, wholly unremarkable and does not merit this Court's review.

I. The Decision Below Is Consistent With the Letter and Spirit of this Court's Decisions in Both *Allied* and *Omni*.

Sessions' contention that the Court of Appeals' opinion is at odds with the precedents of this Court

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[2] *Allied* and *Omni* have been identified, along with this Court's decision in *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) as a "new trilogy of cases" which defines this Court's most recent guidance on petitioning immunity. *See* E. Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 Cal. L. Rev. 1177, 1179 (1992).

reveals only a dogged determination to misconstrue those precedents. Beginning with its decision in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961), to its most recent decision in *Omni*, 499 U.S. at 379-80, this Court has repeatedly affirmed the principle that antitrust liability does not attach to concerted activity to influence government action; it only applies to private conduct that itself operates to restrain trade.[3] Where, as here, the only injury complained of results from government action, then there is no claim for violation of the antitrust laws. *Id.* This Court has made clear beyond any doubt that the government's motives and the cause of those motives in imposing a trade regulation is irrelevant to the antitrust inquiry: the only relevant question is *who* imposes the restraint, not *why*. *Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138, 1144 (1st Cir.), *cert. denied*, 114 S. Ct. 70 (1993).

As the Court of Appeals found, Sessions never pleaded or proved injury flowing from anything other than governmental action. Seeking to avoid this barrier to antitrust liability, Sessions tries to trivialize it, arguing here for the first time that this industry "generally requires government permits for the use of the product," Pet. at i; that this is a "fortuitous fact," Pet. at 10; that "the particular standard is one which, by its nature, requires governmental action," Pet. at 10; and that it was a "fortuitous fact that the excluded tank lining process required *a priori* governmental approval," Pet. at 12. Yet the fact that the Uniform Fire Code standard (which still

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[3] *See also United Mine Workers of America v. Pennington*, 381 U.S. 657, 671 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972).

requires underground storage tanks that are leaking hazardous fluids to be removed from the ground, rather than lined) was implemented only through government regulation is not "mere" or "fortuitous" or insignificant but is overwhelming and dispositive of this case.[4] If no government had forbidden lining of leaking tanks, Sessions would have suffered no injury at all.

The opinion below is not in conflict with the letter or policy of this Court's precedents. As lucidly explained by the Court of Appeals, there is a "key distinction between *Allied* and this case":

> The plaintiff in *Allied* was awarded damages only on the theory that the stigma of banning the plaintiff's product from a uniform code caused independent marketplace harm to the plaintiff in jurisdictions that permitted the use of the plaintiff's products. . . . . Unlike the plaintiff in *Allied*, Sessions was not awarded damages on the theory that Joor's "marketing the stigma" . . . caused Sessions any loss of business independent of the losses resulting from the permit denials. The injuries for which Sessions seeks recovery flowed directly from

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[4] Even if this Court accepted the absurd notion that the market sought out government regulation, that fact would do nothing to help Sessions avoid the insuperable barrier that any injury it suffered resulting from such regulation would not be redressable under the antitrust laws. This is one of many dramatic factual distinctions between this case and *Allied*, including differences between Joor's conduct in the Western Fire Chiefs Association, which is an association of government officials, and the Allied defendants' conduct before the National Fire Protection Association, which is an association of private industry.

> government action. *This fact takes the case entirely out of the realm of Allied.*

17 F.3d at 299 (citations omitted; emphasis added). Indeed, the opinion of the Court of Appeals is fully consistent with *Allied*'s most fundamental premise: Where a restraint upon trade or monopolization is the result of a valid governmental action, as opposed to private action, those urging the governmental action enjoy ***absolute immunity*** from antitrust liability for the anticompetitive restraint. *Allied*, 486 U.S. at 499.

II. There Is No Conflict Among the Circuits

The conflict among the circuits that Sessions urges this Court to resolve is illusory. First, none of the cases cited interprets *Allied*, as each of them predates that decision by from three to as many as thirteen years.[5] Since *Allied*, every circuit to have considered the issue presented here has agreed with the Ninth Circuit that no antitrust liability flows from government regulation. *See Sandy River*, 985 F.2d at 1143 (holding that "the significant factor is direct market effect"); *Lawline v. American Bar Ass'n*, 956 F.2d 1378, 1383 (7th Cir. 1992) (holding bar associations immune from antitrust liability for injuries resulting from court adoption of rules), *cert. denied*, 114 S. Ct. 551 (1993); *Municipal Utilities Board of Albertville v. Alabama Power Co.*, 934 F.2d 1493, 1505 (11th Cir. 1991) (holding that when the restraint is the result of governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability); *Juster Associates v. Rutland*, 901

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[5] See cases cited in Petition at 13.

F.2d 266, 271 (2d Cir. 1990) (holding developer immune from antitrust liability because restraint complained of resulted from governmental action).

Second, each of the cases Sessions cites discusses the "sham" exception to the *Noerr* doctrine, which is not at issue here. The "sham" exception to *Noerr* immunity applies when "persons use the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon," *Omni*, 499 U.S. at 380; it does not apply to exempt from antitrust immunity "one 'who "genuinely seeks to achieve his governmental result, but does so through improper means." ' " *Id.* (quoting *Allied*, 486 U.S. at 508 n.10).[6] The sham exception does not apply here because there is no contention that Joor was not genuinely seeking to influence government regulation and there is no evidence that Joor's activities resulted in any restraint other than that resulting from government regulation.

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[6] Most of the cases Sessions cites are in accord with this principle. See *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America*, 438 F.2d 1286, 1298 (5th Cir. 1971) ("conduct . . . not action designed to influence policy . . . does not justify antitrust immunity"), *cert. denied*, 404 U.S. 1047 (1972); *Greenwood Utilities Commission v. Mississippi Power Co.*, 751 F.2d 1484, 1505 n.14 (1985) (same); *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 812 (2d Cir. 1983) (conduct not undertaken in the hope of influencing governmental action, but in the hope of delaying it, falls under sham exception), *cert. denied*, 464 U.S. 1073 (1984); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1253 (9th Cir. 1982) (conduct "intended only to delay competitive action, not to influence governmental action" is a mere sham), *cert. denied*, 459 U.S. 1227 (1983).

Third, in *Allied* and again in *Omni*, this Court expressly rejected the interpretation of the "sham" exception urged by Sessions. Indeed, that interpretation – that governmental action induced by improper means is a "sham" – was rejected by this Court specifically in reference to the earlier Ninth Circuit opinion in *Sessions*. *See Allied*, 486 U.S. at 507 n.10 (citing and rejecting the opinion in *Sessions Tank Liners v. Joor Manufacturing*, 827 F.2d 458, 465 n.5 (9th Cir. 1987)); *Omni*, 499 U.S. at 380.[7]

III. This Case Does Not Present A New Issue Of Law

This Court has decided – several times now – that where the only anticompetitive injury results from governmental action, rather than private restraint, the use of improper means to secure that governmental action is immune from antitrust liability. *See Omni*, 499 U.S. at 383 (holding that there is no "conspiracy" exception to *Noerr* immunity and that " 'deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned,' " quoting *Noerr*, 365 U.S. at 145); *Allied*, 486 U.S. at 499, 508 n.10 (rejecting "improper means" exception to *Noerr* immunity and holding where the restraint results from governmental action, as opposed to private action, there is absolute immunity from antitrust liability); *Noerr*, 365 U.S. at 145 (holding party who "deliberately deceived the public and public officials"

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[7] To the extent that the District of Columbia Circuit's opinion in *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 279-280 (D.C. Cir. 1972) (or any of the cases cited in footnote 6, *supra*), adopts the "improper means" test for the sham exception, it too was implicitly overruled by *Allied*, 486 U.S. at 507 and *Omni*, 499 U.S. at 382.

entitled to immunity). Thus, Sessions' argument that this case presents an undecided issue for review is disingenuous at best.

The reason that the Ninth Circuit declined to "deconstruct" the decision making process of government is precisely because no injury flowed from anything other than governmental action.[8] The Ninth Circuit did not conclusively presume (as argued in the Petition) that the government action from which Sessions' injury flowed was not influenced by Joor; rather, as a matter of law, it concluded that such an inquiry was

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[8] The cases Sessions cites are inapposite. In *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 594 (1976) the issue was application of the state action defense under *Parker v. Brown*, 317 U.S. 341 (1943), a defense that Joor has never raised in this case. Further, in *Cantor*, this Court did not "deconstruct" the governmental decisionmaking, but held that injury flowed independently from the private restraint. *Cantor*, 428 U.S. at 594. Finally, *Cantor*'s continuing vitality has been placed in doubt by subsequent decisions of this Court. See *California Retail Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48 (1985); *Lease Lights, Inc. v. Public Service Co. of Oklahoma*, 849 F.2d 1330, 1333 & n.2 (10th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989).

In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) this Court held that an action to enforce a patent knowingly procured by fraud may constitute a violation of § 2 of the Sherman Act. The *Walker Process* doctrine, which has been limited to enforcement of legal monopolies, does not apply here as Joor did not engage in enforcement action of any kind. *See California Eastern Laboratories, Inc. v. Gould*, 896 F.2d 400, 403 (9th Cir. 1990).

Finally, *Garrison v. Louisiana*, 379 U.S. 64 (1964) and *St. Amant v. Thompson*, 390 U.S. 727 (1968), are libel cases which do not address the issues presented here. Sessions never alleged that it was libeled; it alleged Joor violated the antitrust laws.

irrelevant and even repugnant to the principles underlying *Noerr. Sessions*, 17 F.3d at 300. As the Ninth Circuit opinion points out, if courts engage in deconstructing the reasons for government decisionmaking to impose antitrust liability, the petitioning immunity would be meaningless, as it would shield nothing that would otherwise cause liability. *Id.* It is only if some restraint flows directly from private action that further analysis would be warranted. That is not the case here.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JEROME I. BRAUN
(Counsel of Record)
DOUGLAS R. YOUNG
TAMAR PACHTER
FARELLA, BRAUN & MARTEL
235 Montgomery Street
Suite 3000
San Francisco, CA 94104
(415) 954-4400

DAVID E. LUNDIN
402 West Broadway, Fourth Floor
San Diego, CA 92101
(619) 239-0100

Counsel for Respondent
Joor Manufacturing, Inc.